In the Supreme Court of the United States

OCTOBER TERM, 1927

No. 607

THE UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION, and FORT SMITH, SUBIACO & ROCK ISLAND RAILROAD COMPANY, appellants

v.

MISSOURI PACIFIC RAILROAD COMPANY

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF ARKANSAS

BRIEF FOR THE UNITED STATES

OPINIONS

The specially-constituted District Court (Circuit Judge Booth and District Judges Youmans and Reeves) filed its opinion on August 5, 1927 (R. 197) which is reported as *Missouri Pacific Railroad Co.* v. *United States*, 21 F. (2d) 351.

The reports of the Commission appear as *Fort Smith, Subiaco & Rock Island Railroad Company* v. *Arkansas Central Railroad Company*, 87 I. C. C.

617 (R. 179), February 12, 1924; *Fort Smith, Subiaco & Rock Island Railroad Company* v. *Alabama & Vicksburg Railway Company,* 102 I. C. C. 708 (R. 183), October 23, 1925; 107 I. C. C. 523 (R. 10), March 2, 1926.

JURISDICTION

On May 28, 1926, the order of the Commission was suspended and a preliminary injunction was issued against its enforcement. (R. 27.)

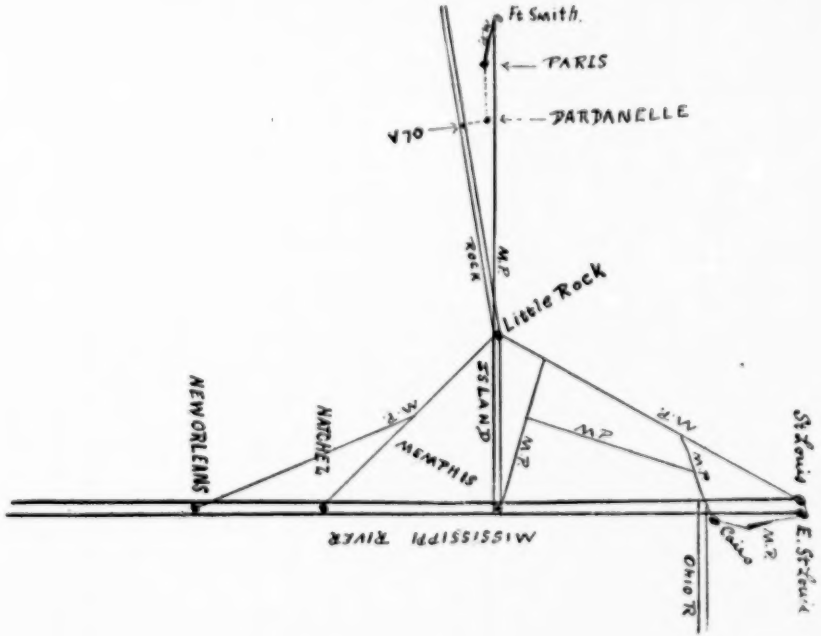
On September 8, 1927, the final decree was entered which annulled the order and made the preliminary injunction permanent. (R. 28.)

On October 17, 1927, the direct appeal to this Court was allowed (R. 194), which was well within the sixty (60) days provided by the Urgent Deficiencies Act of October 22, 1913 (c. 32, 38 Stat. 219, 220), under which the suit was commenced (R. 2, 28), and Section 238 of the Judicial Code as amended by the Act of February 13, 1925 (c. 229, 43 Stat. 938; U. S. C., Title 28, Sec. 47).

QUESTION

Does the order of the Commission* "short haul" Missouri Pacific which operates its own separate through route from Memphis to Fort Smith and from there in the reverse direction back to Paris, Ark., by establishing a new through route over Fort Smith, Subiaco & Rock Island Railroad, a short line operating in Arkansas, and which links the line of Chicago, Rock Island & Pacific which connects at Ola or eastern terminal of the short line, and the line of

*Appendix A.


Ft Smith.
PARIS
PARDANELLE
OLA
ROCK
M.P
Little Rock
ISLAND
NEW ORLEANS
NATCHEZ
MEMPHIS
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St Louis
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Cairo
M.P
MISSISSIPPI RIVER
OHIO R

Missouri Pacific which connects at Paris or western terminal of the short line, the three forming the new through route from Memphis to Fort Smith via Ola and Paris, for through westbound traffic which does not originate on the Missouri Pacific?

STATUTES

Section 15 of the Interstate Commerce Act, as amended by Section 4 of the Act of June 29, 1906 (c. 3591, 34 Stat. 590), provides:

> The Commission may also, after hearing on a complaint, establish through routes and joint rates as the maximum to be charged and prescribe the division of such rates as herinbefore provided, and the terms and conditions under which such through routes shall be operated, when that may be necessary to give effect to any provision of this Act, and the carriers complained of have refused or neglected to voluntarily establish such thorugh routes and joint rates, *provided no reasonable or satisfactory through route exists*,[1] and this provision shall apply

[1] Notwithstanding the words in italics, the Commission ordered certain carriers to establish a second through route with joint rates, *In the Matter of Through Passenger Routes via Portland, Oregon*, 16 I. C. C. 300. In *Interstate Commerce Commission* v. *Northern Pacific Railway*, 216 U. S. 538 (1910), the decree of the District Court which had annulled and enjoined the order was affirmed. Whereupon by amendment the Congress struck out the words, "provided no reasonable or satisfactory through route exists," and thereby enlarged the power of the Commission to establish through routes and joint rates under Section 15.

when one of the connecting carriers is a water line.

Section 15 of the Interstate Commerce Act, as amended by Section 12 of the Act of 1910 (c. 309, 36 Stat 539, 552), provides:

> The Commission may also, after hearing, on a complaint or upon its own initiative without complaint, establish through routes and joint classifications, and may establish joint rates as the maximum to be charged and may prescribe the division of such rates as hereinbefore provided and the terms and conditions under which such through routes shall be operated, whenever the carriers themselves shall have refused or neglected to establish voluntarily such through routes or joint classifications or joint rates; * * *
>
> And in establishing such through route, the commission shall not require any company, without its consent, to embrace in such route substantially less than the entire length of its railroad and of any intermediate railroad operated in conjunction and under a common management or control therewith which lies between the termini of such proposed through route, unless to do so would make such through route unreasonably long as compared with another practicable through route which could otherwise be established.[2]

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[2] On February 25, 1910, Senator Elkins (W. Va.) introduced Senate Bill 6737, which was referred to the Committee on Interstate Commerce. On March 28, 1910, a favorable report was made by that Committee to the Senate without amendment. On June 3, 1910, after a number of amend-

In all cases where at the time of delivery of property to any railroad corporation being a common carrier, for transportation subject to the provisions of this Act to any point of destination, between which and the point of such delivery for shipment two or more through routes and through rates shall have been established as in this Act provided to which through routes and through rates such carrier is a party, the person, firm, or corporation making such shipment, subject to such reasonable exceptions and regulations as the Interstate Commerce Commission shall from time to time prescribe, shall have the right to designate in writing by which of such through routes such property shall be transported to destination, and it shall thereupon be the duty of the initial carrier to route said property and issue a through bill of lading therefor as so directed, and to transport said property over its own line or lines and deliver the same

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ments had been made to the text, the bill was passed. The amendment of 1910 of Section 15, which authorized the Commission to establish through routes and divisions of rates and prohibited the Commission from requiring any carrier, without its consent, to embrace in such route substantially less than the entire length of its railroad, was passed by the Senate in the exact words in which it was introduced. (Cong. Rec. Vol. 45, Pt. 8, 8238).

On January 10, 1910, Representative Townsend (Mich.) introduced H. R. 17536 which, on April 1, 1910, was reported to the House with amendments. The House bill contained no "long haul" paragraph. (Cong. Rec. Vol. 45, Pt. 1, 497; Pt. 4, 4146).

In lieu of the words "the termini of such proposed through route, unless to do so would make such through route unreasonably long as compared with another practicable

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> to a connecting line or lines according to such through route, and it shall be the duty of each of said connecting carriers to receive said property and transport it over the said line or lines and deliver the same to the next succeeding carrier or consignee according to the routing instructions in said bill of lading: *Provided, however,* That the shipper shall in all instances have the right to determine, where competing lines of railroad constitute portions of a through line or route, over which of said competing lines so constituting a portion of said through line or route his freight shall be transported (c. 309, 36 Stat. 553; U. S. C. Title 49, Sec. 15 (8)).*

Section 15 of the Interstate Commerce Act as amended by section 418 of the Transportation Act of 1920 (c. 91, 41 Stat. 456, 485; U. S. C. Title 49, Sec. 15 (3) and (4)) provides:

> (3) The Commission may, and it shall whenever deemed by it to be necessary or de-

through route which could otherwise be established," as contained in the Senate bill, the House bill contained the words "the termini and would form part of such through route unless the route by way of such last-described line of railroad is unreasonably long as compared with such proposed route."

The conference report adopted the Senate amendments without change. (Senate Documents, Vol. 61, 61st Congress, 2d Session, 1909–1910, Document No. 623, June 14, 1910, page 15, Conference Report, Commerce Court, etc.).

* Paragraph (8) of Section 15 was passed by the Senate in the exact words in which it was introduced except the proviso at the end thereof did not appear in either the Senate or House bill but appeared for the first time in the Conference Report. (Senate Documents, Vol. 61, 61st Congress, 2d Session, Document No. 623, June 14, 1910, pages 15, 16.)

sirable in the public interest, after full hearing upon complaint or upon its own initiative without a complaint, establish through routes, joint classifications, and joint rates, fares, or charges, appliable to the transportation of passengers or property, or the maxima or minima, or maxima and minima, to be charged (or, in the case of a through route where one of the carriers is a water line, the maximum rates, fares, and charges applicable thereto), and the divisions of such rates, fares, or charges as hereinafter provided, and the terms and conditions under which such through routes shall be operated; and this provision, except as herein otherwise provided, shall apply when one of the carriers is a water line. * * *

(4) In establishing any such through route the Commission shall not (except as provided in section 3, and except where one of the carriers is a water line), require any carrier by railroad, without its consent, to embrace in such route substantially less than the entire length of its railroad and of any intermediate railroad operated in conjunction and under a common management or control therewith,[4] which lies between the termini of such proposed through route, unless such inclusion of lines would make the through route unreasonably long as compared with another practicable through route which could otherwise be established: * * *

[4] On December 19, 1919, motion was made on the floor of the Senate to strike out paragraph (4) and the point of order was made. (Cong. Rec. Vol. 59, Pt. I, p. 883.)

Section 15 of the Interstate Commerce Act was amended by section 419 of the Transporation Act of 1920 (c. 91, 41 Stat. 456, 487) by inserting "(8)" at the beginning of the fifth paragraph of section 15 (which by the 1910 act authorized the shipper to direct his choice of routes); and by section 420 of the Transportation Act of 1920 (c. 91, 41 Stat. 456, 487; U. S. C. Title 49, Sec. 15 (9) and (10)) by adding two new paragraphs numbered (9) and (10), viz:

> (9) Whenever property is diverted or delivered by one carrier to another carrier contrary to routing instructions in the bill of lading, unless such diversion or delivery is in compliance with a lawful order, rule, or regulation of the Commission, such carriers shall, in a suit or action in any court of competent jurisdiction, be jointly and severally liable to the carrier thus deprived of its right to participate in the haul of the property, for the total amount of the rate or charge it would have received had it participated in the haul of the property. The carrier to which the property is thus diverted shall not be liable in such suit or action if it can show, the burden of proof being upon it, that before carrying the property it had no notice, by bill of lading, waybill or otherwise, of the routing instructions. In any judgment which may be rendered the plaintiff shall be allowed to recover against the defendant a reasonable attorney's fee to be taxed in the case.
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> (10) With respect to traffic not routed by the shipper, the Commission may, whenever

> the public interest and a fair distribution of the traffic require, direct the route which such traffic shall take after it arrives at the terminus of one carrier or at a juntion point with another carrier, and is to be there delivered to another carrier.

Appendix B relates to the antecedent history of the Act of 1910 and Appendix C relates to the antecedent history of the Act of 1920.

STATEMENT

The undisputed determinative facts are that Ft. Smith, Subiaco & Rock Island, an independent corporate common carrier of interstate passengers and property, operates 54 miles of steam railroad which lies between Paris, its western end where it connects with Missouri Pacific, and Ola, its eastern end where it connects with Chicago, Rock Island & Pacific, with which connections it interchanges traffic at those points. (87 I. C. C. 617, 618; 102 I. C. C. 709; R. 180, 184.)

The country is semimountainous in character and the highways are practically impassable for loaded vehicles. The valley is fairly well settled and productive. (87 I. C. C. 618; R. 180.) The chief tonnage outbound consists of coal, cotton, lumber, and other forest products. There remain large undeveloped deposits of high-grade bituminous and semianthracite coal and much standing marketable timber (R. 180) which amounts to from 10 to 15 years' supply at present rates of cutting. (102

I. C. C. 710; R. 185.) For over 30 years the inhabitants of the valley served by the Paris branch and the Subiaco line, now about 70,000 (102 I. C. C. 710; R. 185), have endeavored, through contributions of lands, monies, labor, and material, to secure railroad transportation facilities (87 I. C. C. 618; R. 180).

The railroad has been in operation since September, 1920. Through routes and joint rates are now available on intrastate traffic to and from points on the Paris branch in connection with Subiaco line through Dardanelle-Ola gateway. (87 I. C. C. 619; R. 181.) The movement of interstate traffic to and from such points is restricted to the Missouri Pacific through Ft. Smith. (87 I. C. C. 619; 102 I. C. C. 710; R. 181, 185.) While of great benefit to the territory which it serves and shippers testified their interests would be seriously affected if Subiaco line were forced to cease operations, thus far, though economically operated, its revenues have been insufficient to meet its operating and other expenses and interest on funded debt. (87 I. C. C. 619; 102 I. C. C. 710; R. 181, 186.) Certain shippers also testified to delays at Ft. Smith to their cotton shipments during the rush season on account of congestion and embargoes, and others to the inadequacy of car supply for coal. (87 I. C. C. 619; R. 181.)

Ft. Smith, Subiaco & Rock Island Railroad petitioned the Interstate Commerce Commission for through routes and joint rates over its line as desir-

able in the public interest from and to eastern interstate points (R. 184), and represented that its own revenues were insufficient to pay operating expenses and fixed charges and that its continued operation was necessary to the section served by it, but would be impossible unless the desired routes and joint rates were established. (102 I. C. C. 708; R. 184.) By an amended petition the Subiaco line prayed for an order establishing through routes from eastern interstate points through the Ola-Dardanelle-Paris gateway *via* its line and the Paris branch of the Missouri Pacific to Ft. Smith and points beyond, in all cases where such routing would not deprive an initial carrier of the long haul (102 I. C. C. 711; R. 186); it was further alleged that the Subiaco line urgently needed the revenue which the overhead business would produce for it, and that if it did not get revenue in that way it must cease operations (R. 186). The issues were much broader than those of the original complaint (R. 186).

In the first report (87 I. C. C. 617; R. 179) the Commission found the Subiaco line was entitled to through routes from eastern points. No order was entered but the Commission said, "If within 30 days arrangements have not been made for the establishment of through routes in accordance with the above findings we will enter an order making such additional carriers parties as may be appropriate, and assigning the case for further hearing." (87 I. C. C. 621; R. 183.)

In the second report (102 I. C. C. 708; R. 183) the Commission directed the dismissal of the complaints.

In the third report (107 I. C. C. 523; R. 10) the Commission entered the order in question (R. 19, 20, Appendix A).

Missouri Pacific contended before the Commission that the relief prayed, if granted, would require the Missouri Pacific, without its consent, to embrace in the route substantially less than the entire length of its railroad (R. 4), and thus deprive the Missouri Pacific of its traffic in violation of the statute. The Commission held that the westbound through routes and joint rates prayed for, and more particularly described in its order, were desirable in the public interest and that the position of the Missouri Pacific with respect to Section 15 (4) was untenable because the Missouri Pacific did not originate the traffic and was not in the position to claim the haul of the full length of its railroad until after it got possession thereof. (107 I. C. C. 524; R. 11.)

Missouri Pacific then filed the petition for injunction. (R. 1.) After alleging that Subiaco line "is a common carrier for hire of freight and passengers over its line of railroad" and "is subject to the interstate commerce act" (R. 1), Missouri Pacific set up the proceedings before the Commission and alleged the order was void, as its effect was to short-haul the Missouri Pacific in violation of Section 15 (4) (R. 4).

The District Court issued the preliminary injunction (R. 27), and on final hearing annulled the order and made the preliminary injunction permanent (R. 28). The appeal was then allowed. (R. 194.)

ASSIGNMENT OF ERRORS AND POINTS

While separate errors are assigned to certain holdings or the use of certain specific language by the District Court in its opinion, the assignment of errors and the points relied on may, for the purpose of this argument, be summarized under the general error of the District Court in holding that the issuance of the order of March 2, 1926, was not within the authority conferred upon the Commission by section 15 (3) and (4) of the Interstate Commerce Act. (R. 192.)

SUMMARY OF ARGUMENT

Section 15 (3) and (4) was designed to empower the Commission to create new through routes and joint rates pursuant to a previous policy declared by Congress in its action in striking from Section 15 the words, "provided no reasonable or satisfactory through route exists," after the decision in *Interstate Commerce Commission* v. *Northern Pacific*, 216 U. S. 538.

The limitation prescribed in paragraph (4) that in establishing any such through route the Commission shall not require any carrier by railroad, without its consent, to embrace in such route substantially less than the entire length of its railroad which lies between the termini "of such proposed through route,"

was not intended to submerge the provisions of paragraph (3) of section 15. The Court will give force and effect to each and every part of the statute.

Missouri Pacific's claim that the newly-established route through the Ola-Dardanelle-Paris gateway "short-hauls" it, is groundless for the simple reason that Missouri Pacific does not operate through that gateway and its main line is not part "*of such proposed through route.*" Its much emphasized main line from Memphis to Ft. Smith lies many miles north of the Subiaco line, with a river intervening and impassable roads which leave the population of the community and the 54 miles of railroad of the Subiaco line utterly without any through routes and joint rates on westbound interstate transportation. Missouri Pacific secures the haul on such part of its line as is embraced in "such proposed through route," that is to say, its branch from Paris to Ft. Smith; and, of course, from Ft. Smith to Kansas City, and other points beyond Ft. Smith to which it may operate its line. Traffic moving from territory east of the Mississippi River may never come into possession of Missouri Pacific until it reaches Paris.

The order covers westbound traffic only. Not acquiring the traffic at either Memphis or Ft. Smith and, if it did acquire it, not being able to handle it through the region which is served by the Subiaco line, Missouri Pacific is not in a position to make the claim that it is "short-hauled." For many years the Commission has construed the clause to mean that possession of the traffic is essential to maintain the long haul; *a fortiori*, inability to handle the traffic over

"such proposed through route" by its main line and never acquiring possession of the traffic until it reaches Paris puts it beyond the power of Missouri Pacific to complain that by the new route it is "short-hauled."

The opinion and decree of the District Court failed to give force and effect to the statute in accordance with the views expressed by this Court in a series of cases which emphasize the provisions of the Interstate Commerce Act that competition among carriers shall be preserved as fully as possible.

ARGUMENT

THE PURPOSES WHICH THE STATUTE WAS DESIGNED TO SUBSERVE

The significance of the action of Congress in striking the words "provided no reasonable or satisfactory through route exists" from Section 15 is apparent. Moreover, the Transportation Act of 1920 obviously enlarged the power of the Commission to establish through routes and joint rates, thus:

> The Commission may, and it shall whenever deemed by it to be necessary or desirable in the public interest, after full hearing upon complaint or upon its own initiative without a complaint, establish through routes, joint classifications, and joint rates, fares, or charges, applicable to the transportation of passengers or property, or the maxima or minima, or maxima and minima, to be charged * * *.
>
> In establishing any such through route the Commission shall not * * * require any

> carrier by railroad, without its consent, to embrace in such route substantially less than the entire length of its railroad * * * which lies between the termini *of such proposed through route*, unless such inclusion of lines would make the through route unreasonably long as compared with another practicable through route which could otherwise be established. (Italics ours.)

Accepting the principle relied on by counsel for the Missouri Pacific in the District Court that "all the words used in the statute should be given their proper signification and effect," *United States* v. *Lexington Mill Co.*, 232 U. S. 410, and "We are not at liberty to construe any statute so as to deny effect to any part of its language. * * * Another rule equally recognized is that every part of a statute must be construed in connection with the whole, so as to make all the parts harmonize, if possible, and give meaning to each," *Market Co.* v. *Hoffman*, 101 U. S. 112, 115, their further argument, which was sustained by the District Court, means that the statute was designed to strike down competition and to encourage monopoly of traffic. Counsel for Missouri Pacific would read the statute in this way, "There shall be but one route from St. Louis, East St. Louis, Cairo, Memphis, Natchez, and New Orleans to Paris and Fort Smith, and certain points west thereof, and that route shall be over the Missouri Pacific." Such a construction certainly does not give force and effect to that clause of the statute which provides that "The Commission may, and shall whenever deemed by it to be necessary

or desirable in the public interest * * * establish through routes * * * and joint rates * * * applicable to the transportation of passengers or property." Moreover, Missouri Pacific may not handle traffic *westbound* through Ola and Paris as its line does not operate over that route.

The new route does not require Missouri Pacific to abandon in the slightest degree the through route which it now operates. The order of the Commission merely establishes a new route and the statute directs the Commission shall do that. The order allows shippers and connecting carriers the choice of routing and leaves to Missouri Pacific its main line haul whenever traffic is routed that way. But the Missouri Pacific may not force routing over its line which is in another route by preventing the establishment of a new route.

The Commission did not order anything away from Missouri Pacific as distinguished from the 353 other carriers who are parties to the tariffs. It is a far-fetched proposition to maintain that Ft. Smith, Subiaco & Rock Island should be denied participation in the handling of westbound traffic which moves through the Mississippi and Ohio river gateways. According to argument of counsel for the Missouri Pacific, the Chicago, Rock Island & Pacific is excluded completely by the statute from accepting westbound traffic at Memphis for Ft. Smith over the new route.

The new route is established over the Subiaco line from Ola to Dardanelle, to Paris, to Ft. Smith, on

westbound traffic. In its order the Commission says nothing about termini, but assuming the termini are Memphis and Ft. Smith, "the entire length of its railroad" which lies between the termini *of such proposed through route* is only the Paris branch of the Missouri Pacific, which extends eastward 46 miles from Ft. Smith to Paris. (102 I. C. C. 709; R. 184.) Subiaco line connects with Missouri Pacific at Paris, and runs eastwardly 40 miles to Dardanelle and there connects with a branch of the Chicago, Rock Island & Pacific, which Subiaco line operates a distance of 14 miles to Ola, which is the point of interchange between Subiaco line and Chicago, Rock Island & Pacific. (102 I. C. C. 709; R. 185.) Therefore the links of the route are Missouri Pacific, Ft. Smith to Paris, 46 miles; Subiaco line, Paris to Ola, 54 miles; and Rock Island, Ola to Memphis, 208 miles (107 I. C. C. 526; R. 13), total, 308 miles. Missouri Pacific, direct line, Memphis to Ft. Smith, 308 miles; to Paris, 356 miles (R. 181).

The Missouri Pacific claims that because it has a direct line from Memphis to Ft. Smith and Paris, the Commission was without power to establish a through route westbound via Ola, Dardanelle, and Paris, in a valley and via a railroad which are without through-route and joint-rate railroad service on interstate westbound traffic. The purpose of the new route was to provide such as well as revenue to Subiaco line. Obviously the new route traverses territory which Missouri Pacific concededly does not traverse with the full length of its line. The fact that

Memphis is at one end of its line and Ft. Smith is at the other has nothing to do with the matter.

Missouri Pacific claims that by the order it may lose some traffic which the Subiaco line and its connections may gain. The argument assumes that the Missouri Pacific may be deprived of traffic of which it has acquired possession and control. But if traffic is routed by either carrier or shipper over Illinois Central, Chicago to Memphis; Rock Island to Ola; Subiaco line to Paris; and Missouri Pacific to Ft. Smith, wherein is Missouri Pacific "short-hauled" merely because it is directed to participate in the haul, Paris to Ft. Smith? It is only because the Missouri Pacific operates the Paris branch that it acquires any participation whatever in the route and traffic thereover.

The argument of Missouri Pacific and the opinion and decree of the District Court obviously also submerge the statute which authorizes shippers to route traffic over routes of their own selection.

In *Waverly Oil Works Co.* v. *Pennsylvania Railroad*, 28 I. C. C. 621, 630, as far back as 1913, the Interstate Commerce Commission said, "Still later this provision for joint rates was changed so as to allow the establishment between two points of an indefinite number of routes, but it was now provided in the establishing of a through route no railroad should be required to haul traffic over less than the entire length of its line unless such route was unduly circuitous. The purpose of Congress here again is plain. *If a railroad has traffic in its possession, it*

shall be allowed to handle it by its own line as far as it can unless the public interest will suffer thereby." See also *Lumber Rates*, 29 I. C. C. 609; *Routing via Midland Continental Railroad*, 78 I. C. C. 328; *Chicago, Milwaukee & St. Paul* v. *Union Pacific*, 88 I. C. C. 312; *Flory Milling Co.* v. *Central New England Railway*, 93 I. C. C. 129; *Routing via Salt Lake and Utah Railroad*, 95 I. C. C. 237.

THE ORDER IS ALSO SUPPORTED BY JUDICIAL AUTHORITY

Reviewing the various steps of the proceedings before the Commission and with a brief statement of the facts and the questions involved, the learned District Court appears to have followed the argument of the counsel for Missouri Pacific and the conclusions of the Commission in its second report in which it found the complaints should be dismissed. This Court has held repeatedly that it is immaterial if the Commission has reached opposite conclusions in different reports. *Manufacturers Railway* v. *United States*, 246 U. S. 457, 482; *New England Divisions Case*, 261 U. S. 184, 187, 203.

Holding that none of the propositions involved in *Dayton-Goose Creek Railway* v. *United States*, 263 U. S. 456, and *United States* v. *Abilene & Southern Railway*, 265 U. S. 274, are involved in the instant case, and stating that section 15 (4) is a limitation on the authority granted in section 15 (3), the District Court said, "If either Ft. Smith or Paris is the western terminus of the proposed route, the Missouri Pacific has through lines to each one of those points from all

eastern points involving interstate traffic. In the order of the commission all of these lines are excluded from consideration except the branch line from Ft. Smith to Paris. The order embraces substantially less than the entire length of the railroad of the Missouri Pacific between the eastern and western termini of the road involved in the order." (R. 200.)

It is observable that this language entirely eliminates any consideration whatever of all of that territory lying between Paris and Ola in which the Subiaco line is located, and that the route of the Missouri Pacific over its main line between Memphis and Ft. Smith is a considerable distance north of this territory and is not and can not be made a part "*of such proposed through route.*" Missouri Pacific alone simply can not serve territory in the Ola-Dardanelle-Paris gateways with through routes and joint rates on interstate westbound traffic, and the people and the railroad of that community must either do without such transportation entirely or secure the affirmance of the validity of the order of the Commission. There would seem to be no question that the new route is in the public interest and that the service can be accomplished in no other way.

Further, the District Court said, "The general term 'public interest,' as used by the Commission in its concrete application, means the securing of additional revenue to the Subiaco. The public interest in the maintenance of the Subiaco as a part of the transportation system of the country does not justify the taking of a part of petitioner's line and

using it as an instrumentality for producing income for the Subiaco in competition with and to the detriment of the petitioner." (R. 201.)

This language is counter to the decisions of this court in *New England Divisions Case*, 261 U. S. 184, *United States* v. *Abilene & Southern*, 265 U. S. 274, and other well-known cases.

Granting that the financial necessities of the Subiaco line constitute a part of the public interest, the record does not sustain the holding that that alone caused the Commission to enter the order. The transportation needs and necessities of a community provided by the maintenance of the Subiaco line are equally involved and were taken equally into consideration. All of these things the Commission had the right to consider pursuant to a great public policy declared by the Congress and affirmed by this Court in *Dayton-Goose Creek Railway* v. *United States*, 263 U. S. 456, and in other cases which the District Court says have no bearing on this controversy. Moreover, the Missouri Pacific acquired an advantage in having the Paris branch made a part of the through route; if another company had owned that branch, Missouri Pacific would have been excluded completely.

Again the District Court says, "In this case the taking is justified upon the ground that in the operation under the order the Subiaco will gain more than the Missouri Pacific will lose. This does not appear to be a sufficient reason. * * * The distinction made between initial and intermediate and delivering carriers is abstract. The Commission recognizes the

right of a carrier to handle traffic in its possession and it states that a carrier has no right to traffic still in the possession of connecting lines. The result of the reasoning is that if routes may be established by which traffic may be so handled that it will not pass over the Missouri Pacific rails until it reaches Paris that road can have no legal ground for complaint. That such routes may be established is no doubt true, but the fact still remains that from the points considered, St. Louis, Cairo, Memphis, and New Orleans, the Missouri Pacific has other lines to Paris, Arkansas, by way of Ft. Smith. The essential point here is whether or not the Misouri Pacific under the circumstances can be compelled to join in establishing such routes when it has lines available which will give to it the longer haul." (R. 202, 203.)

It is earnestly submitted that the idea conveyed by the words "when it has lines available which will give to it the longer haul" has nothing whatever to do with the matter and is the fundamental error in the opinion of the District Court. The Ola-Dardanelle-Paris railroad and community are without through routes and joint rates on westbound interstate transportation, and the Missouri Pacific can not furnish it to them with all of its through lines to Ft. Smith because its main line lies a considerable distance north of the Subiaco line (as a glance at the map will disclose) with a river intervening with no passable roads or any bridges (87 I. C. C. 618; 102 I. C. C. 710; R. 180, 185). If Missouri Pacific had been able and willing to do so, the proceeding before

the Commission never would have been commenced and we would not be here. The new route over the Rock Island line and the Subiaco line was absolutely essential for the accomplishment of the purpose which the order of the Commission was designed to subserve.

Any argument that the Missouri-Pacific with its through line operating between Memphis and Ft. Smith is of any value to the railroad and community in the valley between Ola and Paris is utterly futile. Missouri Pacific is not in a position to assert monopoly on all traffic to the exclusion of all competitors, a policy condemned by the provisions of the Transportation Act of 1920. Thus, in the plan for the consolidation of railway properties into a limited number of systems competition shall be preserved as fully as possible and whenever practicable the existing routes and channels of trade and commerce shall be maintained. (c. 91, 41 Stat. 481; U. S. C. Title 49, Section 5, paragraph (4).)

St. Louis Southwestern Railway v. *United States*, 245 U. S. 136, 143, 144:

> The order merely compels a through route and a joint rate of 16 cents to Paducah. * * * That Congress has power to authorize the Commission to enter an order for through routes and joint rates, like that here complained of, has been heretofore assumed. * * * And there is no foundation in fact or law for the contention of complainants that the Commission disregarded the provision of § 15, by which it is prohibited from embracing in a through route "less than

the entire length" of a railroad "unless to do so would make such through route unreasonably long."

United States v. *American Railway Express Company, 265 U. S. 425, 436, 437:*

The competitive route ordered must, of course, be reasonable in character from the standpoint of transportation; and there must be reasonable cause for establishing it. In this case, no objection is made to the character of the routes ordered. The objection is that, as a matter of law, the competitive routes cannot be justified because the time required for delivery over the existing routes of the American is as short as it would be under the competitive joint routes. To this objection the action taken by Congress supplies an answer. Under the Act of 1906, the Commission could act only if no "reasonable or satisfactory through route exists." In *Interstate Commerce Commission* v. *Northern Pacific Ry. Co.*, 216 U. S. 538, this Court set aside an order to establish a second through route because it deemed the existing one adequate. Thereupon, Congress, by the Amendment of 1910, struck out the proviso and empowered the Commission to establish through routes "whenever deemed by it to be necessary or desirable in the public interest."

In transportation, the quality of the service furnished may be as important to the shipper as the rate. The Commission found, in the proceeding under review, that the service of the American, in some instances, had been

inadequate; and that in "considering competition, time is not the only important element. Competition tends to make each company improve its general treatment of the public, its practices, rules, and regulations in regard to its methods of doing business." It found, also, that the "service at common points has improved since the formation of the Southeastern." Its conclusion, that the establishment of the competitive routes was necessary and desirable in the public interest, is not shown to have been unreasonable.

The existence of a competitive route ordinarily implies an option in the shipper. To give him the privilege of directing the routing is a corollary of the establishment of competitive routes. Upon shippers of railroad freight this right was expressly conferred by Congress, in paragraph 8 of § 15, subject only "to such reasonable exceptions and regulations" as the Commission may prescribe. The rights, in this respect, of shippers by express, were not dealt with in terms. The matter was, therefore, left subject to regulation by the Commission under general provisions of the act. Paragraph 3, which empowers the Commission to establish through routes, authorizes it, also, to fix "the terms and conditions under which such through routes shall be operated." Its order that the shipper by express may direct the routing is not unreasonable. As the American has no absolute right to retain traffic which it originates, and as the provision authorizing the shipper to

direct the routing is reasonable, the order does not violate any of its constitutional rights.

In the foregoing case the effect of the order is that the Southeastern Express is receiving and handling traffic which the American Express has carried to the Washington gateway. In the arguments at the Bar, counsel for the American Express rested practically his whole case on the so-called equities of the situation, e. g., the loss of business to American Express which the latter had acquired only to have the Commission turn it over to the Southeastern Express at the Washington gateway when both companies had through routes from Washington to Birmingham, etc.

The claim of Missouri Pacific does not reach the heights of the situation which prevailed in *United States* v. *American Railway Express, supra,* because Missouri Pacific will never acquire or otherwise lay its hands on the traffic until it reaches Paris.

In *United States* v. *New York Central,* 272 U. S. 457, 461, the railway carrier had refused to operate a switch connection and with its locomotives and cars to furnish transportation over the piers of the State of New York at Buffalo in order to facilitate the exchange of traffic between the New York Central and the water lines under the Panama Canal Act. "The effect of appellee's refusal to perform the transportation service ordered by the Commission is to preclude the interchange of traffic between rail carriers and barge canal carriers at Buffalo, *and incidentally to avoid the diversion to the canal of a sub-*

stantial amount of traffic now passing over the lines of the railroad company to and from industries located along its right-of-way."

In brief, the contention of the New York Central was that as to some traffic it would lose it altogether and as to other traffic it would be "short hauled." The District Court annulled and enjoined the order and on appeal this Court, in reversing the decree, said (p. 463), "The construction of the Act contended for is unwarranted by its language and incompatible with its purpose to create an administrative body with authority to facilitate the interchange of interstate traffic between rail and water carriers by a less formal procedure than prevails in courts of law. We conclude that the commission had authority to make the order and that its findings were supported by the evidence."

In *United States* v. *American Railway Express* and *United States* v. *New York Central, supra*, the District Courts in both cases had annulled the orders and issued injunctions; and in both cases this Court reversed the decrees.

CONCLUSION

The decree should be reversed with directions to dissolve the injunctions and to dismiss the petition.

WILLIAM D. MITCHELL,
Solicitor General.

BLACKBURN ESTERLINE,
Assistant to the Solicitor General.

FEBRUARY, 1928.

APPENDIX A

(R. 13,19)

ORDER

At a general session of the Interstate Commerce Commission, held at its office in Washington, D. C., on the 2d day of March, A. D. 1926.

No. 13850 (Sub-No. 1)

Fort Smith, Subiaco & Rock Island Railroad Company *v.* The Alabama & Vicksburg Railway Company and 353 other railway and steamship companies and the receivers of certain thereof

This case being at issue upon complaint and answers on file, and having been duly heard and submitted by the parties, and full investigation of the matters and things involved having been had, and the commission having, on the date hereof, made and filed a report on further consideration containing its findings of fact and conclusions hereon, which said report, together with the report of division 4 in this proceeding, dated October 23, 1925, is hereby referred to and made a part hereof:

It is ordered that the above-named defendants be, and they are hereby, notified and required to establish, on or before May 20, 1926, upon notice to this

commission and to the general public by not less than five days' filing and posting in the manner prescribed in section 6 of the interstate commerce act, and thereafter to maintain, through routes applicable westbound over complainant's line via Ola, Dardanelle, and Paris, Ark., on traffic moving under class and commodity rates between points of origin and destination named in the following tariffs, and supplements thereto and reissues thereof, to wit—

Southwestern Lines Tariff No. 15–L, F. A. Leland's I. C. C. No. 1562;
Southwestern Lines Tariff No. 5–P, F. A. Leland's I. C. C. No. 1573;
Southwestern Lines Tariff No. 82–D, F. A. Leland's I. C. C. No. 1588;
Southwestern Lines Tariff No. 50–O, F. A. Leland's I. C. C. No. 1614;
Southwestern Lines Tariff No. 38–M, F. A. Leland's I. C. C. No. 1640;
Southwestern Lines Tariff No. 45–P, F. A. Leland's I. C. C. No. 1644;
Southwestern Lines Tariff No. 114–A, F. A. Leland's I. C. C. No. 1645.

and joint rates for application on traffic moving over such routes which shall be the same as those published in said tariffs and supplements thereto and reissues thereof, between the same points of origin and destination, in effect over existing routes: *Provided, however,* That this order shall not be construed as requiring any defendant to participate in any through route or joint rates thereover which would require it to surrender possession of traffic which

it has originated or received from a connecting carrier to another carrier for transportation over a route which embraces less than the entire length of such defendant's railroad and of any intermediate railroad operated in conjunction and under a common management and control therewith, which lies between the termini of such route.

It is further ordered that this order shall continue in force until the further order of the commission.

By the Commission.

[SEAL.] GEORGE B. MCGINTY,
Secretary.

A true copy:

[SEAL.] GEORGE B. MCGINTY,
Secretary.

APPENDIX B

In its Annual Report to Congress on December 21, 1909, the Interstate Commerce Commission reported as follows (page 7):

THROUGH ROUTES

> This Commission now has authority to establish a through route and joint rate "provided no reasonable or satisfactory through route exists." Elsewhere in this report, in connection with a reference to the Portland Gateway case, it is suggested that this proviso should be eliminated with respect to passenger travel at least; and, in our opinion, it should be stricken out as to freight traffic also. While it may usually be true that a shipper can use without disadvantage the existing route, if that be a reasonable one, still there are cases where additional joint rates ought to be established, notwithstanding that the route already in existence may fairly be termed reasonable and satisfactory. Railroads ought not to be required to turn over their business to a competitor; but we think the Commission should have authority to establish through routes and joint rates wherever, upon investigation, it is found that the public necessity and convenience, having due reference to the interests of the carrier, require such action.

RIGHT TO ROUTE TRAFFIC

Of much the same character is the right to route traffic. The courts now hold, apparently, that carriers have this right, or at least that they may reserve it in their tariffs and may therefore, as a practical matter, exercise it at will.

Ordinarily it is immaterial to a shipper by what route his traffic moves, if it reaches its destination in due time, upon a proper rate and with the desired delivery. In such cases there is no apparent reason why the railroad ought not to be permitted to send that traffic by whatever route it may elect. There are, however, circumstances under which the privilege of designating the route by which the traffic shall move is a matter of convenience as well as value to the shipper, and under such circumstances his right ought to be protected. In our opinion the Commission should have authority, after investigation, to prescribe the conditions under which traffic may be routed by the shipper.

President TAFT, on January 7, 1910, in a Special Message to Congress, made the following recommendation:

> The claim is very earnestly advanced by some large associations of shippers that shippers of freight should be empowered to direct the route over which their shipments should pass to destination, and in this connection it has been urged that the provisions of section 15 of the interstate-commerce act, which now empowers the commission, after

> hearing on complaint, to establish through routes and maximum joint rates to be charged, etc., when no reasonable or satisfactory through route shall have been already established, be amended so as to empower the commission to take such action, even when one existing reasonable and satisfactory route already exists, if it be possible to establish additional routes. This seems to me to be a reasonable provision. I know of no reason why a shipper should not have the right to elect between two or more established through routes to which the initial carrier may be a party, and to require his shipment to be transported to destination over such of such routes as he may designate for that purpose, subject, however, in the exercise of this right to such reasonable regulations as the Interstate Commerce Commission may prescribe. (Special Message of the President to the two Houses of Congress, Document 484, 61st Cong., 2d Session, pages 8 and 9, January 7, 1910, referred to the Committee of the Whole House; Cong. Rec., Vol. 45, Pt. 1, p. 462.)

Senator ELKINS (W. Va.) on June 16, 1910, called up the Conference Report on the Railroad Bill (which report appears in the proceedings of the Senate of June 14, 1910) and made the following remarks:

> Section 15 of the existing law is further amended so as to increase the power of the Commission with respect to the prescribing of joint rates and through routes. The language of this amendment is substantially the same as that of the original bill, with the exception

of the two amendments adopted by the Senate which have been retained. The first provides that the commission shall not have the right to establish any through route or rate when the transportation is wholly by water. The second provides that in establishing a through route the commission shall not require any company, without its consent, to embrace any such route substantially less than the entire length of its railroad and any intermediate railroad operated in conjunction and under a common management or control therewith which lies between the termini of such proposed through route, unless to do so would make such through route unreasonably long, as compared with another practicable through route which could otherwise be established.

Section 15 has been further amended by adding to it, in substance, the provisions of the bill originally introduced in the Senate and House, giving to the shipper the right to designate the route over which his property is to be transported. An amendment adopted by the Senate has been retained in the conference bill, to the effect that the shipper shall in all instances have the right to determine, where competing lines of railroad constitute a portion of the through line or route, over which of said competing lines so constituting a portion of said through line or route his freight shall be transported. (Cong. Rec., Vol. 45, Pt. 8, pages 8238, 8239, 8240.)

Representative MADDEN (Ill.), on April 18, 1910, the House resolving itself into Committee of the Whole House for the futher consideration of the bill

H. R. 17536, the Railroad Bill, made the following remarks:

> But the bill also confers additional powers of a kind not now possessed and over new subjects. At present, if there exists a reasonable and satisfactory through route over connecting lines from one given point to another, the commission has no power to establish or designate a new through route. A route is said to be reasonable and satisfactory when, in the judgment of the commission, it is reasonably safe, expeditious, and economical. By the terms of this bill the commission may, in its reasonable discretion, designate and establish new through routes, notwithstanding that there already exists a through route meeting the requirements just mentioned. That this gives the commission great power to introduce competition is obvious.
>
> The question of the right of the shipper to route his freight, by which we mean his right to designate the connecting lines over which it shall be transported to the consignee after the initial carrier has parted with it, is a slightly different subject from that just mentioned. At present the shipper has no control of the matter. The initial carrier may send it over such other lines as best suits its convenience or caprice, greatly inconveniencing both shipper and consignee unnecessarily and adding to the cost of transportation. The bill gives the shipper the right to designate the route and the intermediate carriers, subject, however, to such reasonable rules and regulations as may be established by the commission. (Cong. Rec., Vol. 45, Pt. 5, page 4940.)

APPENDIX C

Commissioner CLARK, of the Interstate Commerce Commission, on July 21, 1919, testified before the Committee on Interstate and Foreign Commerce, House of Representatives, on the subject of the Return of Railroads to Private Ownership, as follows:

> Mr. CLARK. From our standpoint I can see no objection to giving the commission a wider latitude in the exercise of administrative discretion in that matter.[1] The bill as you have read it or that part which you have read is substantially the present law, except the proviso referring to section 3, and a slight change in the language at the end of the section which corrects a somewhat ambiguous expression about which there has been controversy. The idea is that the carrier shall be protected in retaining to itself the long haul which it is in a position to perform, and we have, of course, respected that provision, although we have found some few instances in which it would result in an unreasonably long route. A certain route might be unreasonably long for the transportation of live stock and yet be reasonable for the transportation of lumber because as to the one there is every reason for expedition and as to the other the demand for expedition is ordinarily absent.

[1] The provision that the Commission shall not require any carrier by railroad, without its consent, to embrace in such route substantially less than the entire length of its railroad.

Mr. SWEET. My thought is that this part of the bill might prohibit a short-line railroad from obtaining a through route provided the trunk line or line with which it connects failed or refused to give their consent, and my thought is that the commission possibly should have wider discretionary power to pass upon the question in case the connecting trunk line arbitrarily refused; in other words, not to leave the question wholly to the trunk line?

Mr. CLARK. That would be simply an extension of the discretion vested in the commission, and which, of course, it would attempt to administer, if charged with it, in a judicial frame of mind. There is no doubt but that the connecting roads, the originating roads, or the intermediate roads would have a broader opportunity under a change such as you suggest than they have under the restrictions of this section. (U. S. House Hearings, 66th Cong., 1st Session, Return of Railroads to Private Ownership, Vol. 1, page 101.)

Commissioner CLARK of the Interstate Commerce Commission, on July 22, 1919, testified before the Committee on Interstate and Foreign Commerce, House of Representatives, on the subject of the Return of Railroads to Private Ownership, as follows:

The provision in the act as it is at present, giving the shipper the right to direct over which of available routes his shipments shall move and via which of the intermediate lines within those routes it shall move, is, I think, a protection to the intermediate or what we might call the weaker lines, because they are

able, in so far as they can influence, by their soliciting agents, to get the freight routed over their roads, and the carriers having that route open must under this law carry the freight as routed by the shipper, whereas the selfishness of the originating carrier might send it over some other line if it had full latitude in the premises. (U. S. House Hearings, 66th Cong., 1st session, Return of Railroads to Private Ownership, Vol. 1, page 123.)

Representative MANN (Ill.), on February 21, 1920, requested that the conference report on the Railroad Bill (Transportation Act of 1920) be read to the House of Representatives and it was so ordered. The conference report contains the following paragraphs:

WATER CARRIERS—EMBRACING ENTIRE LENGTH OF LINE IN THROUGH ROUTE

(Section 418 of the conference bill)

The House bill and the Senate amendment both continued the provisions in section 15 of the interstate commerce act, forbidding the commission to require any railroad to embrace in a through route "substantially less than the entire length of its railroad," but the Senate amendment contained the provision that this restriction should not hinder the establishment of a through route where one of the carriers is a water line. The conference bill practically adopts the Senate provision on this subject, specifically relieving the

commission from this restriction where one of the carriers is a water line.

* * * * *

DIVERSION OF TRAFFIC

(Section 420 of the conference bill)

Section 419 of the House bill added to the interstate commerce act a provision that whenever property is diverted or delivered by one carrier to another carrier contrary to routing instructions in the bill of lading, the carrier thus deprived of its right to participate in the haul of the property should have a right of action against the carrier by which or to which such traffic was unlawfully diverted for the total amount of the rate or charge it would have received had it participated in the haul. It was provided that this provision should not apply where the diversion or delivery was in compliance with a lawful order of the commission, and that the carrier to which the property was diverted should not be liable if it could show that, when it carried the property, it had no notice of the routing instructions. The Senate amendment contained a similar provision, but afforded no relief if the diversion or delivery was in compliance with an order of the commission, and did not clearly give a right of action against the initial carrier guilty of the diversion. It also based the amount of damages upon the revenues accruing from the diverted traffic. The conference bill in section 420 accepts the House provision as appearing in the House bill.

TRAFFIC NOT ROUTED BY SHIPPER

(Section 420 of the conference bill)

The Senate amendment contained a provision not contained in the House bill that with respect to traffic not routed by the shipper the transportation board might direct the route which such traffic should take after it arrives at the terminus of one carrier and is to be delivered to another carrier. The conference bill in section 420 contains this provision of the Senate amendment, giving the power to the commission, whenever the public interest and fair distribution of the traffic require, to direct the route which such traffic shall take after it arrives at the terminus of one carrier or at a junction point with another carrier and is to be there delivered to another carrier. (Cong. Rec., Vol. 59, Pt. 4, pages 3243, 3264, 3265.)

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